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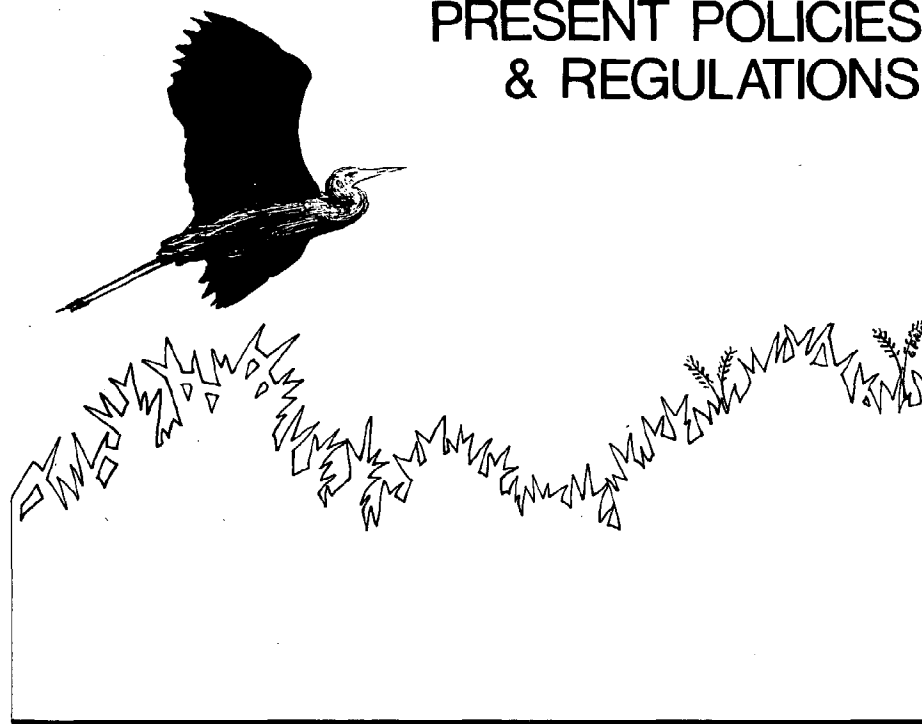
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# WETLAND USE IN WISCONSIN

PRESENT POLICIES  
& REGULATIONS



A Part of VISIONS OF TOMORROW: A Comprehensive Plan  
for the Management of Wisconsin's Water Resources  
Department of Natural Resources  
Madison, Wisconsin  
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## **WETLAND USE IN WISCONSIN: PRESENT POLICIES AND REGULATIONS**

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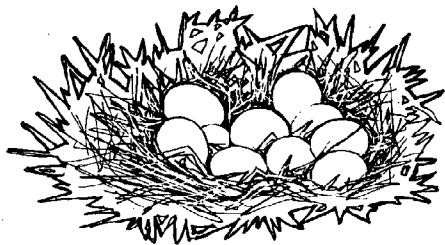
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## INTRODUCTION

This report is one of a series of reports written for the Statewide Water Resources Plan, *Visions of Tomorrow*. Phase one of the plan was published in November, 1973. The purposes of the Plan are to: (1) describe water resource management alternatives; (2) examine the tradeoffs associated with each; (3) solicit people's preferences with respect to the alternatives; (4) present this information to decision makers; and (5) publish the decision makers' choices, which in effect become the plan.

A previous publication, *Wetland Use in Wisconsin: Historical Perspective and Present Picture*<sup>1</sup> provided an historical analysis of wetlands and wetland use in Wisconsin. This report presents an overview of the mosaic of policies, regulations and laws which apply to these wetlands. Both reports were written to provide background information needed in consideration of alternative futures, policies and regulations for the use of the state's wetlands.





"The land belongs to the people...a little of it to those dead...some of it to those living...but most of it belongs to those yet to be born." (Quote on Jackson County Courthouse Letterhead)<sup>24</sup>

## WETLANDS

Wetlands are, in general, *wet lands*, e.g. swamps, marshes, wet meadows, bogs, fens, and are usually defined in terms of water level, soil type and vegetative characteristics. In nature wetland definition is difficult — soil and vegetation types grade into each other and water levels may vary gradually over a continuum of depths. Therefore wetland definition and classification have become controversial subjects. Wetland functions are however more easily recognized and agreed upon. Wetlands serve as:

- a. wildlife habitat and breeding grounds,
- b. natural "croplands" producing harvests of minnows, marsh hay, blueberries, wild rice, sphagnum moss,
- c. ground water storage or recharge areas,
- d. natural breakwaters in erosion prevention,
- e. flood detention and runoff stabilization areas,
- f. outdoor classrooms and laboratories for students and scientists, and as
- g. perhaps the last natural open space available in areas of high population density.

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Note: Reference citations are numbered in alphabetical order in a "Combined Literature Cited and Bibliography". Number codes are used to indicate references in the text. "Footnotes" provide additional information and are coded by lower case letters in the text.

When wetlands are destroyed, for example by dredging and filling operations, the loss of wetland functions follows. Fish and wildlife die off due to loss of habitat and breeding grounds. Runoff increases, increasing nutrient and sediment input into lakes and streams. Floods peak higher and become more destructive. Storm waters run off more quickly reducing the opportunity for recharge. Ground water levels may be reduced.

In presettlement days, Wisconsin was estimated to have approximately 10 million acres of wetlands.<sup>25</sup> Early settlers built near waterways and benefited from the plentiful fish, game and wild crops of the wetlands. However, as population and development increased, wetlands came to be looked upon as "public menaces". In 1850, Congress passed the Swamp Land Act granting existing public domain states full title to all lands in swamp or subject to overflow.<sup>26</sup> Wisconsin was granted about 3.3 million acres of swamp or overflow land. Almost all of this had been sold to private individuals or investors by the early 1900's.<sup>27</sup>

The general purpose of the Swamp Land Act was elimination of wetlands. Wetlands were to be drained and leveed to provide flood protection to settlements and reduce mosquito breeding grounds.<sup>28</sup> Subsequent legislation and regulations relating to wetlands have been curiously at odds with each other. Historical definitions of private property rights become incompatible with the public good or interests. Wetland conservation efforts counter those for fill and/or drainage. Increasing recognition of the value of wetlands in an undeveloped state has led to numerous efforts by state and federal governments to reacquire these lands or regulate their use in the public interest. However, only in cases where wetlands lie in public control does the regulation become relatively simple.

Today an estimated 2.5 million acres of Wisconsin's wetlands remain, 1.6 million acres being in private ownership.<sup>29</sup> The rest were drained, filled or otherwise altered or destroyed in development of cities, muck and other farms, recreation sites, e.g., marinas, resorts, cottages. If we are to retain a significant part of the remainder, a management program specifically designed for wetland management is needed.

At present Wisconsin has no single law or policy directed specifically at wetland use or management. Current wetland "management" policy derives from a mosaic of bits and pieces of local, state and federal regulations, policies and legislation.

## LAWS, POLICIES AND REGULATIONS —

In the beginning:

"The Congress shall have the Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article 1, Section 8 U.S. Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people" Amendment 10, U.S. Constitution.

Water laws, like most laws, evolved under a system of dual sovereignty, each state developing its own laws and regulations subject to ultimate sanction of federal law and the question of constitutionality. Federal jurisdiction over navigable waters is established in the Commerce Clause of the Constitution (Article 1, Section 8). Over the years, *commerce* has come to include regulation of *transportation*<sup>a</sup> and in turn, control of navigable waters for the purpose of *navigation*.<sup>b,16</sup>

"Navigable waters" have also undergone substantial redefinition. Traditional federal definition held navigable waters to be the "waters below the mean high water or mean high tide." The Federal Water Pollution Control Act Amendments of 1972 defined navigable waters as "the waters of the U.S. including the territorial seas." This definition is now interpreted to include almost anything that is wet, that is traditional navigable waters, their tributaries—primary, secondary, tertiary, etc. — and all contiguous or adjacent wetlands.<sup>17</sup>

Wisconsin statutory law declares that "(a)11 lakes wholly or partly within this state which are navigable in fact are declared to be navigable...and (a)11 streams, sloughs, bayous and marsh outlets which are navigable in fact for any purpose whatsoever, are declared navigable..." The Wisconsin Supreme Court decision, *Muench v. Public Service Commission*<sup>c</sup>, established as a test of navigability that "any stream is navigable in fact which is capable of floating any boat, skiff or canoe of the shallowest draft used for recreational purposes."

Federal regulatory powers over water resources are exercised through the Corps of Engineers, the Federal Power Commission, the Coast Guard, the Department of the Interior, and the Environmental Protection Agency. The state's rights to regulate water are derived from the 10th Amendment to the U.S. Constitution. While subject to all federal water laws, Article IX, Section 1 of the Wisconsin Constitution delegates control over

Wisconsin's surface waters, in other words waters bordering the state and all navigable waters within the state, to the state government. In general, this control is exercised for regulation of private water rights, creation of certain property rights and the police power necessary for regulation of property in the public interest, e.g. zoning.<sup>18</sup> In the absence of specific land or water rights' legislation or regulation the riparian doctrine applies.<sup>d</sup> In other words, the owner (riparian) of land bordering a lake or other waterway has rights to reasonable use of the water. Reasonableness is dependent upon the effect of a use upon other riparians.

### Constitutionality

The 5th Amendment of the U.S. Constitution guarantees that no person shall "be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

Article I, Section 13 of the Wisconsin Constitution declares that "the property of no person shall be taken for public use without just compensation therefor."

Therefore, any substantial restriction on the use of wetlands, shorelands or other privately owned lands must be shown to be for the public good or purpose and not to constitute an inequitable restriction or a taking of land without compensation. The government, state or federal, may restrict land use under the power of eminent domain, or by means of the police power granted it through established laws or regulations.

### Power of Eminent Domain

Under the power of eminent domain land use may be restricted in the public interest via condemnation and purchase. The purchase price must reflect a fair and joint evaluation of the property value arrived at between government and privately retained assessors. The government may purchase full title ("fee simple interest") to the land in question or may establish an *easement* that is, condemn only certain uses of the land compensating the landowner for value lost. In the latter case, land ownership remains in private hands but some public use is allowed or development use prohibited, for example, public access to a waterway is allowed or drainage and fill is prohibited.<sup>19</sup>

<sup>a</sup>*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) \*1 (1824)

<sup>b</sup>*Gilman v. City of Philadelphia* (70 U.S. (3 Wall.) 713 (1865)).

<sup>c</sup>261 Wis. 492, 53 NW 2d 514 (1952).

<sup>d</sup>The riparian doctrine remains applicable in the State of Wisconsin and most states east of the Mississippi River.

### Exercise of the Police Power

Exercise of the police power in enforcement of laws or regulations restricting land use (e.g. zoning) which do not provide for compensation in some form may raise the constitutional question of taking. The question of taking arises when restrictions on property become so severe or diminish its value so greatly that the private landowner is made to pay for the maintenance of the public good. In order for the regulation to remain valid "just compensation" must be paid.<sup>8</sup> Since no convenient scale has been established to determine how severe a restriction or regulation must be to constitute a taking, all such determination must be carried out on a case by case basis.

### The Question of Compensation and the Tax Base

In 1973 the Wisconsin Legislature passed Assembly Joint Resolution 1 (AJR 1). Upon ratification, AJR 1 amended the Uniformity Clause<sup>9</sup> of the Wisconsin Constitution to provide that agricultural or other undeveloped, e.g. conservancy, lands need not be taxed on a par with developed lands as was previously required.

If legislation is adopted formalizing Assembly Joint Resolution 1, agricultural or conservancy lands will be eligible for *preferential taxation* that is, a reduction of the private property taxes based on use value rather than market value assessment. Provisions for such a system of preferential taxation were set forth in 1975, Assembly Bill (AB) 1082, "Taxation and Preservation of Agricultural and Conservancy Lands".<sup>9</sup> As long as designated lands remain in agricultural or conservancy uses they would be eligible for reduction in property taxes. Such a program would allow private citizens interested in preserving land in its natural state or for agricultural purposes to do so without the burden of increasing tax rates which result from the pressure of nearby development.

In the absence of preferential property taxation, land continues to be taxed based on market value assessment. Therefore, police power regulations which restrict land to conservancy or "limited development" uses may cause the individual landowner to pay for preservation of the public good. In such a case, the regulations would represent a form of taking and would require compensation.

At present compensation for value lost could take several forms:

- a. The state or federal government would reimburse the landowner for the value removed due to the restrictions applied.<sup>10</sup>
- b. Should the restrictions constitute an exercise of eminent domain, the state or federal government would purchase the fee simple interest (title) to the land, thereby removing it from private ownership and from the tax rolls.

Since the property tax represents Wisconsin's largest single source of revenue,<sup>11</sup> public ownership and preferential taxation provisions are often criticized on the basis that they remove dollars from the tax base. Programs such as Wisconsin's *aids-in-lieu of taxes*<sup>12</sup> tend to offset tax losses. Under this program state in-lieu payments on DNR lands (e.g. recreation, forest or state park lands) are made to eligible cities, villages and towns. Currently, these payments are made at a rate of 50 cents per acre.<sup>13</sup> It is obvious that this rate may be far below the tax which would be levied if the land in question were fully developed. However, concern over possible loss to the tax base often results in failure to recognize the value of land in its natural state, either as current or potential agricultural land or simply as open space.

Hugo Fisher, Administrator of the Resources Agency of California in 1967, argued that development of land is not always the more profitable alternative for a community:

"... ( land ) in parks is almost always more profitable in a community than the same land would be on the tax rolls. Most urban land on the tax rolls goes into residential developments. Before accepting the tax roll argument, I suggest we add up the costs of the new schools, the new streets, the police and fire protection, the sewage facilities and all the other services necessary to any housing development. Then...contrast this with the increased values in areas surrounding the land dedicated as parks or open space. Why is the highest priced land often around parks and golf courses?"<sup>14</sup>

<sup>8</sup>Article VIII, Section 1 of the Wisconsin Constitution.

<sup>11</sup>Chapter 90 Laws of 1973.



## FEDERAL JURISDICTION OVER WETLANDS<sup>9</sup>

### Historical Background

Article 1, Section 8 of the U.S. Constitution gave Congress the right to "regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."

In 1899 Congress passed the Rivers and Harbors Appropriation Act (the Act). (See inset — The Rivers and Harbors Appropriation Act of 1899.) The original purpose of the Act was to provide a measure of police power in preventing unreasonable obstruction to navigation and thereby to commerce. In fact, prior to the 1970's, the Rivers and Harbors Act provided the basis for almost all federal regulation of commerce and navigation on U.S. waterways and represented the only federal legislation which held any hope for controlling development on lands adjacent to waterways, including wetlands.

Since its enactment, numerous legal interpretations have been applied to the Act. Section 10 in particular has undergone considerable reinterpretation. This section outlines activities in or adjacent to navigable waters which are to be controlled, e.g. dredge and fill operations. In 1925, the Attorney General delegated control over these activities to the Corps of Engineers (Corps) and the Secretary of the Army. However, this authority remained subject to Congressional consent. Four years later, in a strict reading of Section 10, the Supreme Court removed the requirement for Congressional consent. This decision as set forth in *Wisconsin v. Illinois*<sup>h</sup> granted the Secretary of the Army (and thereby the Corps) independence in issuing permits under Section 10.

Though the permit granting authority changed hands over the years, the basic intent of the Act remained the same, that is control of commerce and navigation. However, reasons for which a permit might be issued or denied are not expressly outlined in Section 10. In other words, nothing explicitly limited the Secretary of the Army to consideration of commerce and navigation alone.

<sup>9</sup>Unless otherwise specified information in this section is referenced to articles 15 and 28.

<sup>h</sup>278 U.S. 399. 49 S. Ct. 163, 73 L.Ed. 426 (1929).

"...many things which happened many years ago will seem nearly related to the present, and many things which are recent will seem ancient." — Leonardo da Vinci

### **The Rivers and Harbors Appropriation Act of 1899**

Originally enacted as Act of March 3, 1899 ch. 425 30 Stat. 1151, the Rivers and Harbors Act has been amended, the original Act and amendments appearing in USC 33 . . . 401 et. seq. (1970). The following interpretation of the Act is excerpted directly from the Department of the Army, Corps of Engineers 1974 publication: *Applications for Department of the Army Permits for Activities in Waterways*.<sup>9</sup> For original wording of the Act see reference 27.

"The principal laws administered by the Corps of Engineers in regulating structures and work in or affecting navigable waters of the United States, the discharge of dredged or fill material into navigable waters, and the transportation of dredged material for the purpose of dumping into ocean waters are as follows:

"Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the water body lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state, if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army.

"Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters are unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by Section 4 of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333 (f.)).

"Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharfs, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Regulations have been promulgated relative to this authority and published as Title 33 of the Code of Federal Regulations, Section 209.150. By policy stated in those regulations effective May 27, 1970, harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Permits for work shoreward of those lines must be obtained in accordance with Section 10 of the same Act, cited above.

"Section 12 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 406) provides for penalties of up to \$2,500 and/or one year imprisonment for violation of the Act as well as removal of unauthorized structures.

"Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency, under Sections 402 and 405 of the Federal Water Pollution Control Act (PL 92-500, 86 Stat. 816).

"Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

"Section 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river on their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and Chief of Engineers."

## Extension of Corps Regulation in Navigable Waters

Concern over Corps regulated programs, affecting wetlands in particular, was brought out in an investigation by the House Committee on Government Operations in 1970. This Committee urged the Corps to use its powers as delegated under Section 10 not only in preservation of navigation but also in preservation of the natural associations contiguous to navigable waters, e.g. wetlands. In other words the Corps was asked to assert its powers as a protector of the environment. Such powers seem clearly established when the authority delegated to the Corps under Section 10 is coordinated with the responsibilities outlined in the Fish and Wildlife Coordination Act<sup>i</sup> and the National Environmental Policy Act. (See inset on Legislation Relating to the Corps' current 404 Permit System for more complete explanations.)

Referring to the Corps' past performance, the Committee described the Corps' policy as "largely laissez-faire...concerning land fills and construction on submerged lands and tidewaters landward of harbor lines, (thereby violating) its statutory responsibility to protect all aspects of the public interest in those lands."<sup>ii</sup> The Committee, therefore, recommended that the Corps revise its requirements to allow for permit refusal on natural conservation or public interest grounds. A restrictive view of its responsibilities, in other words, control of navigation alone and its restrictive definition of navigable waters would no longer be accepted.

As a result of its investigation the House Committee prepared House Report 91-917, "Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution". The five major recommendations contained in this report are outlined as follows:

1. In evaluating permit applications for dredge and fill or construction activities, the Corps was urged to consider the effects such activity would have not only on navigation but also on the public interest, for example conservation of natural resources, fish and wildlife, air and water quality, aesthetics.
2. The Corps was urged to increase its protective and police power functions especially for submerged and tidal water lands and lands lying between designated harbors and shorelines.

<sup>i</sup> 1958 as amended (48 Stat. 401, 16 U.S.C.A. 661 et seq.).

## Legislation Relating to the Corps Current 404 Permit System

### 1. Fish and Wildlife Coordination Act, 1958<sup>i</sup>

In order to maintain the quality of the aquatic environment and protect fish and wildlife resources:

"Whenever the waters of any stream are to be diverted, controlled or modified, the channel deepened or water impounded so as to result in an impoundment having a surface area of at least 10 acres, the U.S. Fish and Wildlife Service and the State Agency having jurisdiction over the wildlife resources must be consulted."<sup>ii</sup>

### 2. Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army, July 13, 1967.<sup>iii</sup>

In granting permits for work in wetlands the Corps is required to "give great weight" to the views of the Fish and Wildlife Service and the National Marine Fisheries Service as well as to the water quality views of the Environmental Protection Agency. No permit is to be granted for work in wetlands identified as important by the above agencies "unless the public interest requires otherwise".<sup>iv</sup>

3. The National Environmental Policy Act of 1969<sup>v</sup> declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall \*\*\* ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations \*\*\* iv (emphasis added)

### 4. Zabel v. Tabb<sup>v</sup>

The *Zabel v. Tabb* decision represented the first case law authorization which allowed the Corps of Engineers to deny dredge and fill permits on nonnavigational, e.g. environmental grounds. The Corps' authority was expanded to protection of fish and wildlife resources upon which commerce is often highly dependent. Estuarine and other wet lands represent primary breeding and habitat areas for many important species of fish and wildlife. The Corps was therefore given power to regulate dredge and fill operations which may tend to destroy the ecological balance in such areas.<sup>vi</sup>

3. The Committee recommended establishment of some public hearing mechanism to encourage public input into Corps' proposals for modification of waterways, e.g. modification of harbor lines.

5. *Federal Water Pollution Control Act of 1972*<sup>vi</sup>

The Federal Water Pollution Control Act (FWPCA) recognizes and designates that the Corps of Engineers in its operations (e.g. dredge and fill; surveying and planning for reservoirs) follow guidelines established by the Environmental Protection Agency (EPA) which will include consideration of the effect such projects will have not only on navigation, but also on water supplies, recreation, aesthetics and fish and wildlife.<sup>15</sup>

The FWPCA in conjunction with Ocean Dumping Act of 1972 and Section 12 of the Rivers and Harbors Appropriations Act of 1899 establishes legally enforceable pollution standards (in this case especially for estuarine and coastal areas) which carry the additional weight of strong criminal and civil penalties for noncompliance.<sup>16</sup>

Section 401 of the Federal Water Pollution Control Act<sup>iv, vii</sup> requires any applicant for a Federal license or permit to conduct any activity which may result in a discharge into navigable waters to obtain a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

Section 404 of the Federal Water Pollution Control Act<sup>iv, viii</sup> authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites. The selection of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas, wildlife or recreational areas.

6. *Marine Protection Research and Sanctuaries Act, 1972*<sup>iv, ix</sup>

Section 103 of the Marine Protection Research and Sanctuaries Act of 1972<sup>x</sup> authorizes the Secretary of the Army to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. However, similar to the EPA Administrator's limiting authority cited in paragraph (b) (7) of

this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies.

Section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972<sup>xi</sup> authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

7. *Coastal Zone Management Act, 1972*<sup>iv, xii</sup>

Section 307 (c) (3) of the Coastal Zone Management Act of 1972<sup>xiii</sup> requires any applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program.

i as amended (48 Stat. 401, 16 U.S.C.A. 661 et. seq.)

ii 33 C.F.R. 209.120 (d) (11) (1972)

iii 42 U.S.C. 4321-4347

iv Excerpted directly from 10.

v 430 F.2d. 199 (5th Cir. 1970) cert. denied 1971

vi P.L. 92-500, 86 Stat. 816

vii P.L. 92-500, 86 Stat. 816, 33 U.S.C. 1411

viii P.L. 92-500, 86 Stat. 816, 33 U.S.C. 1344

ix P.L. 92-532, 86 Stat. 1052

x P.L. 92-532, 86 Stat. 1052, 33 U.S.C. 1413

xi P.L. 92-532, 86 Stat. 1052, 16 U.S.C. 1432

xii P.L. 92-583, 86 Stat. 1280

xiii P.L. 92-583, 86 Stat. 1280, 16 U.S.C. 1456 (C) (3)

4. The Corps was encouraged to strengthen permit requirements for establishment of sewage outfalls into navigable waters. Such requirements were to include the effect of the outfall upon water quality as well as upon navigation.

5. The Committee recommended strict enforcement of the Refuse Act<sup>1</sup> requiring permits for any direct discharge of refuse or polluting materials into navigable waters or onto their banks.

<sup>1</sup>Section 13 of the Rivers and Harbors Appropriation Act, 1899.

As the Corps made efforts to carry out the House Committee's recommendations it became obvious that development of new definitions and tougher permit granting policies were needed to significantly alter established patterns and practices. The Corps regulations as they stood lacked sufficient definition, manpower and established enforcement policy.<sup>k</sup>

The Committee's recommendations were further emphasized by subsequent court decisions, legislative and regulatory actions. (See inset p. 10.) For example, Section 404 of the Federal Water Pollution Control Act (FWPCA) as amended (1972) gave the Corps primary responsibility in regulating disposal of dredge and fill materials in the navigable waters of the U.S.

Traditional definition held that navigable waters were those "which (were) navigable in fact when...used or...susceptible of being used in their original condition" for conducting travel or trade "in the customary modes of travel and trade on water", as adapted from the Supreme Court decision in the *Daniel Ball Case*.<sup>l7</sup>

In 1975 the Corps was ordered to redefine its *navigable waters* to include "(all) waters of the U.S. including the territorial seas", and in general to revise its dredge and fill permitting activities to reflect the intentions of Section 404 of the FWPCA.<sup>m</sup> The Corps' authority to deny dredge and fill permits on environmental rather than navigational grounds had been established in a previous court decision.<sup>n</sup>

In response to these and other orders and decisions, the Corps issued new permit regulations for activities in navigable waters. Revised final regulations were published in the July 25, 1975 *Federal Register*, titled "Permits for Activities in Navigable Waters or Ocean Waters". The definitions and regulations outlined in this report became effective on that date subject to further refinement over a 90 day period.

Included in the report are:

1. specific definitions for: navigable waters (*to include contiguous wetlands*) dredge and fill material, ordinary high water mark...
2. the new 404 permit system for specified activities in navigable waters.
3. a three year phased program for extending the permit regulations from what are traditionally considered navigable waters to "all waters of the U.S.". ('Section 404' Permit Program, an inset, explains the program in more detail.)

The Corps' permit program provides a general framework for protection of navigable waters and wetlands. Each state retains the power to deny a 404 permit on water quality standards (as per Section 401, FWPCA). Each state also retains the power to develop its own waters or wetlands protection programs. As expressed in the Corps' Administrative Procedures: "...we are mindful that many states have existing permit programs to regulate the same types of activities that will be regulated through Section 404 of the FWPCA by the Corps of Engineers. To the extent possible, it is our desire to support the state in its decision. Thus, where a state denies a permit, the Corps will not issue a Section 404 permit. On the other hand, if a state issues a permit, the Corps would not deny its permit unless there are overriding national factors of the public interest which dictate such action. We believe that this type of situation can be kept to a minimum provided the State's permit program has built into it the policies, procedures, goals, requirements, and objectives embodied in the Corps' permit program and the national legislation which molded and supports it."<sup>o</sup>

<sup>k</sup>In 1973, the Corps reported 732 cases of illegal wetland dredging or filling. The total number of illegal projects which go undiscovered or unreported is unknown. Those illegal projects which were discovered could be granted "after the fact" permits. Since these permits were frequently granted, previous Corps policy "in effect sanctioned such illegal operations".<sup>8.7</sup> This is no longer the case. Under the Memo of Understanding (33 C.F.R. 209.120) the Corps reports illegal dredge and fill operations to the U.S. Attorney General for criminal or civil action

as established in Section 12 of the Rivers and Harbors Act (33 U.S.C. 406 amended). This policy has been in effect since 1974.

<sup>l</sup>33 CFR 209.260 (a) as adapted from 77 U.S. (10 Wall.) 557, 563 (1870).

<sup>m</sup>*Natural Resources Defense Council v. Callaway*, 1975.

<sup>n</sup>*Zabel v. Tabb*, 1970 — cert. denied, 1971.

### "Section 404" Permit Program"

Under the laws of the United States, Congress has assigned to the U.S. Army Corps of Engineers certain non-military functions. These include the better-known traditional missions in navigation, flood control, hydropower production, water supply storage and recreation. Congress has also given the Corps of Engineers regulatory responsibility to protect our navigation channels and harbors against encroachments and more recently to restore and maintain water quality by regulating the discharge of dredged or fill material in coastal and inland waters and wetlands. This pamphlet describes this latest regulatory program.

**Authority.** The basis for the U.S. Army Corps of Engineers' responsibility to regulate the disposal of dredged or fill material is the Federal Water Pollution Control Act Amendments of 1972. Section 404 of that Act charges the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged or fill material in the waters of the United States. Initially, the Corps of Engineers limited its regulatory authority under Section 404 to waters which are presently used, were used in the past, or could be used by reasonable improvements to transport interstate commerce.

Limiting the Corps' authority under Section 404 to navigable waters of the United States was successfully challenged in the U.S. District Court for the District of Columbia. On March 27, 1975, the Court directed the Corps of Engineers to extend its responsibility to regulate the discharge of dredged or fill material under Section 404 to all waters of the United States (including the territorial seas) and to revise its regulation accordingly. A proposed draft regulation was published in the *Federal Register* on May 6, 1975, for comment, and an interim final regulation was published on July 25, 1975, and became effective on that date. An additional 90-day comment period was provided to further refine the regulation.

**Purpose.** The purpose of this program, which is part of the Corps of Engineers' overall regulatory authority, is to insure that the chemical/biological integrity of waters of the United States is protected from the irresponsible and unregulated discharges of dredged or fill material that could permanently destroy or alter the character of these valuable resources.

This program provides for the consideration of all concerns of the public — environmental, social, and economic — in the Corps' decision making process to either issue or deny permits. As part of its responsibility to protect water quality, the Corps of Engineers' Section 404 permit program will be extended to many areas that have never been regulated before.

The public is therefore urged to understand and support this program.

**Phased Program.** The Corps of Engineers will expand its authority in a three-phase program over the next two years.

Phase I, effective July 25, 1975, extends the Corps' regulation of

disposal of dredged or fill material to the traditional "navigable waters of the United States" and contiguous or adjacent wetlands. Phase II, effective July 1, 1976, will expand the Corps' permit program into primary tributaries of navigable waters of the United States, lakes, and the contiguous or adjacent wetlands. After July 1, 1977, the Corps will exercise its Section 404 authority over all waters of the United States.

**Moderate, Reasonable Approach.** The Corps of Engineers will use common sense, good judgment, and moderation in carrying out the purpose of the Section 404 permit program. The Corps and the Environmental Protection Agency have worked hard together to develop a meaningful, manageable program which will protect the quality of our waters and preserve the environmental assets of our coastal and inland waters and wetlands. Public cooperation and voluntary compliance will be encouraged, and prosecution will be recommended only when all other options have been exhausted.

**Activities Included.** Along with the discharge of material which has been dredged or excavated from any waters of the United States, the following additional types of activities will also be regulated by this program: site developmental fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters and bulkheads and fills; beach nourishment; levees; sanitary landfills, and backfill required for the placement of structures such as sewage treatment facilities.

**Farming Exempt.** The Section 404 permit program does not apply to normal farming practices such as plowing, cultivating, seeding, and harvesting. Nor does it apply to such farm and ranch conservation practices as terracing, land levelling and the construction of check dams unless they occur in a water of the United States. However, damming of major streams, diking, and the discharge of dredged or fill material in wetlands associated with farm practices will require permits.

**Grandfather Clause.** Discharges of dredged or fill material which occurred in waters other than traditional navigable waters before July 25, 1975, or which are less than 500 cubic yards and will be completed within six months of that date will generally not require permits. In addition, discharges of dredged or fill material which are completed before an effective phasing date or which generally involve minor bulkhead and fills of less than 500 feet in length and 500 cubic yards in volume will not require individual permits provided certain conditions can be met. Water quality and coastal zone management certifications must be obtained before such discharges can occur, however. And the District Engineer may still require an individual to submit an application for a particular discharge falling within one of these exceptions if he feels the interest of water quality requires it.

## Wetlands and the "404 Permit" System

In its published rules and regulations, the Corps recognizes the many values of wetlands. The following excerpts are from the rules and regulations published in the July 25, 1975 *Federal Register*.\*

(3) Effect on wetlands. (1) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. (ii.) Wetlands considered to perform functions important to the public interest include:

(a) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(b) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(c) Wetlands contiguous to areas listed in paragraph (g)(3)(ii)(a) and (b) of this section, the destruction or alteration of which would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics of the above areas;

(d) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands often include barrier beaches, islands, reefs and bars;

(e) Wetlands which serve as valuable storage areas for storm and flood waters; and

(f) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected.

(iii) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in response to new applications, and in consultation with the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(iv) Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important by subparagraph (ii) above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (f) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.

(a) In evaluating whether a particular alteration is necessary, the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether feasible alternative sites are available.

(b) The applicant must provide sufficient data on the basis of which the availability of feasible alternative sites can be evaluated.

(v) ...state regulatory laws or programs for classification and protection of wetlands will be given great weight.

As written, the 404 permit system provides Wisconsin perhaps the most comprehensive program currently established for wetland protection and conservation. The potential value of the program depends upon public awareness of and interest in wetland protection, as well as the Corps' ability to apply and enforce the stated policies and regulations. The effectiveness of the program has yet to be tested.

## STATE-LOCAL JURISDICTION OVER WETLANDS

"(In 1973) the Wisconsin Land Resources Committee concluded that 'land use protection and regulation is basically a local matter because most land use is only of local importance'. However, selective resources 'are of wider significance' and should be subject to state policies and standards. The committee recommended that state standards in the form of laws and regulations be set 'to control the regulation by local government of land uses which are widespread in scope and impact'.""

This statement suggests that the state's policy should be to protect public rights to the natural environment and in effect supports selective statewide zoning or land use development practices for such purpose. State laws and regulations enacted to prevent pollution and protect the land and waters of the state are therefore recognized as valid expressions of the police power.

### Shoreland and Flood Plain Zoning

The *State Water Resources Act*<sup>o</sup> authorized what is now the DNR to "order abatement of all forms of pollution and to require construction of waste treatment facilities".<sup>u</sup> In line with these general goals, the act also created the Wisconsin *Shoreland Zoning Act*,<sup>p</sup> and the *Flood Plain Zoning Act*.<sup>q</sup> Minimum standards and criteria necessary to meet the objectives of these acts are set forth in Chapters NR 115 and NR 116 respectively of the Wisconsin Administrative Code.

### Shoreland Zoning

Under the Shoreland Zoning Act, shorelands of navigable waters are to be managed as special units. Individual counties are delegated the duty to establish zoning ordinances for unincorporated shorelands of navigable waters which lie within "1,000 feet of a lake, pond, or flowage; (or) 300 feet from a river or stream or to the landward side of the floodplain, whichever distance is greater."<sup>s</sup>

Interpreted very loosely, the Act recognizes the need for development of some shoreland areas while at the same time recognizing that for others the best use may be no use at all. In other words, a balance should be maintained between:

- a. Developed areas needed to accommodate an expanding population's demands for additional recreational, agricultural and commercial enterprises; and
- b. natural undeveloped areas necessary for the protection of water quality, fish and wildlife reproduction, and natural beauty.

In recognition of this balance, a model ordinance prepared by the state outlines the three main zoning divisions or use districts established for various shoreland areas.

1. Wetland areas falling under the regulations would be placed into *conservancy districts*.
2. The majority of all recreational lake or river shoreland would be put into *recreational-residential districts*.
3. The remainder of shoreland areas would fall into *general purpose districts*.

Permitted uses in *conservancy districts* are those which would have minimal effects on the wetland environment, e.g. hunting and fishing, forestry, harvesting of wild crops, display of certain signs. Special exception uses include: dams, flowages, removal of top soil or peat, general farming, cranberry bogs and other uses not involving resident structures, but which may have substantial effect on the existing wetland environment.

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<sup>o</sup>Ch. 614, Laws of 1965.

<sup>p</sup>Sections 59.971 and 144.26 of the Wisconsin Statutes.

<sup>q</sup>Section 87.30 of the Wisconsin Statutes.

<sup>r</sup>Unless otherwise specified information in this section is from 2, 23, 26 and 33.

<sup>s</sup>Section 59.971 (1) Wisconsin Statutes (Suppl. Vol. 3, 1965).

*Recreational-residential* districts, in addition to the uses permitted in conservancy districts, permit development in the form of seasonal and year round family dwellings with corresponding accessory uses. Special exception permits are required and allowed primarily for recreational, commercial type uses, e.g. hotels, restaurants, marinas. Permits issued for such uses may apply additional conditions to the development, e.g. increased minimum lot sizes, including increased setbacks and greater separating distances and special screenings.

*General purpose districts* allow for conservancy, residential-recreational, commercial and agricultural uses.

The following must be established and regulated for all lands zoned under the shoreland zoning ordinance:

- Minimum standards for water supply and waste disposal systems
- Structure setbacks from highways or navigable waters
- Minimum lot sizes and widths (to vary or be conditional upon use)
- Lagooning and dredging regulations
- Filling and grading controls

The last two types of activity require special permits if the land under consideration lies within 300 feet of and has surface drainage toward navigable water and exceeds a minimum size and slope as established under the ordinance. The primary purpose of such regulation is to prevent excessive sedimentation or erosion from exposed shoreland and to prevent structural development on wetlands.

## Flood Plain Zoning

In contrast to shoreland zoning, where the probability for serious flooding damage exists, cities and villages as well as counties are required to adopt flood plain ordinances. The general criteria for regulation are established in Chapter NR 116 of the Wisconsin Administrative Code.<sup>1</sup> As outlined in the code flood plain zoning requires that local ordinances for areas subject to flooding (a) contain a map delineating the floodway and flood plain, and (b) set out applicable restrictions for floodway and flood plain use which become the text of the ordinance.

The floodway is defined as "the channel of a stream and those portions of the flood plain adjoining the channel that are required to carry and discharge the flood water or flood flows of

any river or stream..." The flood plain is the area of "land adjacent to a body of water which has been or may be hereafter covered by flood waters..." For the most part, the floodway is limited to open space use. Fill and construction are not allowed except for that associated with permitted open space uses. Such structures must not be intended for human habitation, must not adversely impede flood flow and must have low flood damage potential (e.g. bridges). The administrative rules do not establish any specific use patterns for flood plain areas. Rather they state that "(a)11 flood plain developments shall be compatible with a local comprehensive plan. In the absence of a formal plan, development shall be compatible with uses permitted in the adjoining district." The rules do require however that any structure built in the flood plain will not have adverse effects on flood plain drainage or storage capabilities. In addition, structures are to conform to certain construction, flood proofing and sanitary regulations. (For a more complete discussion see: NR 116, 2, 12, 26, and 33.)

Both the shoreland and flood plain model ordinances provide only minimum standards. Counties and localities may at their discretion establish stricter provisions for the protection and regulation of such areas. Where an ordinance is not adopted or fails to meet reasonable minimum standards for shoreland protection, the DNR is authorized to establish an acceptable ordinance to be administered at the county or local level.<sup>2,3</sup>

Violations of ordinances are declared public nuisances and are punishable under Section 87.30 of the Wisconsin Statutes. Court action may be brought about by any municipality, the state or any citizen thereof to stop and/or remove any construction or action found in violation of the ordinance. A maximum 50 dollar fine may also be assessed against the violator, each day of violation being considered a separate offense.

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<sup>1</sup>Unless otherwise indicated quoted definitions and rules are from Chapter NR 116 of the Wisconsin Administrative Code.

<sup>2</sup>Sections 59.971 and 87.30 Wisconsin Statutes.

<sup>3</sup>To date all counties have adopted and had approved shoreland zoning ordinances. Milwaukee County is an exception since all county lands are incorporated. In addition, of the 71 counties, 48 have adopted some form of flood plain zoning ordinance; 18 of these have been approved. Of an approximate 500 affected communities, 161 have adopted some form of flood plain zoning ordinance, 145 of which are approved.<sup>13</sup> Though statutes require that shoreland and flood plain ordinances be met by January 1, 1968, flood plain zoning in particular has lagged behind, due for the most part to limitations in manpower and difficulties inherent in delimiting floodways and flood plains.

## Shoreland and Flood Plain Zoning as Wetland Management Tools

Wisconsin's Shoreland and Flood Plain Zoning ordinances currently represent the most "active" and "extensive" state-local programs in wetland conservation. How "active" the ordinances are is determined by the style and manner in which they are enforced, local political arrangements, economic pressures and perhaps most importantly the local interest in wetland conservation. The "extent" of the authority over wetlands, although applying at a minimum to those contiguous to navigable waters, may be expanded to non-contiguous wet areas or wetlands under the regular zoning powers exercised by local governments.

In enforcing the ordinances several problems have been encountered. For example:

1. No complete inventory of Wisconsin's remaining wetlands exists. Sound scientific data and identification of important wildlife habitat areas, floodways and flood plains are also not yet available.
2. Continual policing and strict enforcement are necessary to ensure the ordinances are carried out. Presently manpower and funding limitations preclude effective enforcement.
3. Uniform application of the various provisions is often lacking.
4. Even should the zoning restrictions be strictly and uniformly enforced, the question remains whether the restrictions provided in the model ordinances are sufficient to preserve scenic beauty, water quality and wildlife habitat.
5. While presumed constitutional as drafted, shoreland and flood plain zoning ordinances may still be challenged as they apply overall or to individual properties. No zoning ordinances may represent an unconstitutional taking of private property for the public good; nor may it become so restrictive that it allows a landowner no reasonable use of his property.

The challenge of constitutionality has been addressed in at least one decision, the Wisconsin Supreme Court case, *Just v. Marinette County*. For the most part the other problems and criticisms await resolution.



### *Just v. Marinette County*<sup>w</sup>

Following adoption by Marinette County of a shoreland zoning ordinance, the Justs (husband and wife) began fill operations on a parcel of their land. The land in question was designated as swamp or marsh on United States Geological Survey (U.S.G.S.) maps and according to the provisions of the shoreland ordinance was therefore zoned a conservancy district. Unless a conditional use permit is obtained from the Marinette County zoning commission, fill is not allowed on conservancy land. The Justs had not obtained a permit.

Marinette County therefore brought suit to stop the fill and require the Justs to pay a fine for violation of the ordinance. The Justs appealed the trial court decision to the Wisconsin Supreme Court on the grounds that:

- a. their property was not a "wetland" (swamp or marsh) and therefore not subject to the ordinance;
- b. the prohibition against fill on private property was unconstitutional;
- c. the shoreland zoning ordinance itself was unconstitutional.

Marinette County also appealed with the State of Wisconsin intervening in their behalf.

The following is excerpted from the Wisconsin Supreme Court decision handed down by Chief Justice Hallows.<sup>w</sup>

"There can be no disagreement over the public purpose sought to be obtained by the ordinance. Its basic purpose is to protect navigable waters and the public rights therein from degradation and deterioration which results from uncontrolled use and development of shorelands...

"To state the issue in more meaningful terms, it is a conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power unless the damage to the owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise

of the police power and condemnation has been said to be a matter of degree of damage to the property owner...

"Many years ago, Professor Freund stated in his work on the Police Power, Sec. 511, at 545-547, 'It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful...From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation while the latter on principle does not...'

"An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses. The active public trust duty of the State of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect those waters for fishing, recreation and scenic beauty, *Muench v. Public Service Commission*...

"It seems to us that filling a swamp not otherwise commercially useable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the people.

"*By the Court* — The judgement...dismissing the Just's action, is modified to set forth the declaratory adjudication that the shoreland zoning ordinance of respondent Marinette County is constitutional; that the Just's property constitutes wetlands and that particularly the prohibition in the ordinance against the filling of wetlands is constitutional...The judgement declaring a forfeiture (by the Justs) is affirmed."

This decision clearly supports conservation of wetlands, particularly where such wetlands play an important role in maintaining the water quality of our lakes and streams." It rests with the courts to decide how narrowly or broadly to interpret this decision in future cases.

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<sup>w</sup>1972, 56 Wis. 2d. 7.

## WISCONSIN WETLANDS' LEGISLATIVE EFFORTS

"The lessons as well as the beauties of marshes await the perceptive, as do the lessons and beauties of the skies, of the seas, of the mountains and of the other places remaining where man can still reflect upon the lessons and beauties that are not of human making."

Currently only about 2.5 million acres of Wisconsin's original 10 million wetland acres remain. Since 1971, the Wisconsin Legislature has been involved in attempts to pass a wetlands' protection bill. The various wetlands' bills proposed are outlined in *Legislation Relating to Natural Resources*.<sup>22</sup> To date, none of these bills have succeeded in passing both houses of the legislature. Nevertheless, it has been and remains obvious that a good wetlands' protection bill is needed.

### Wetlands' Protection Bills

#### Definitions

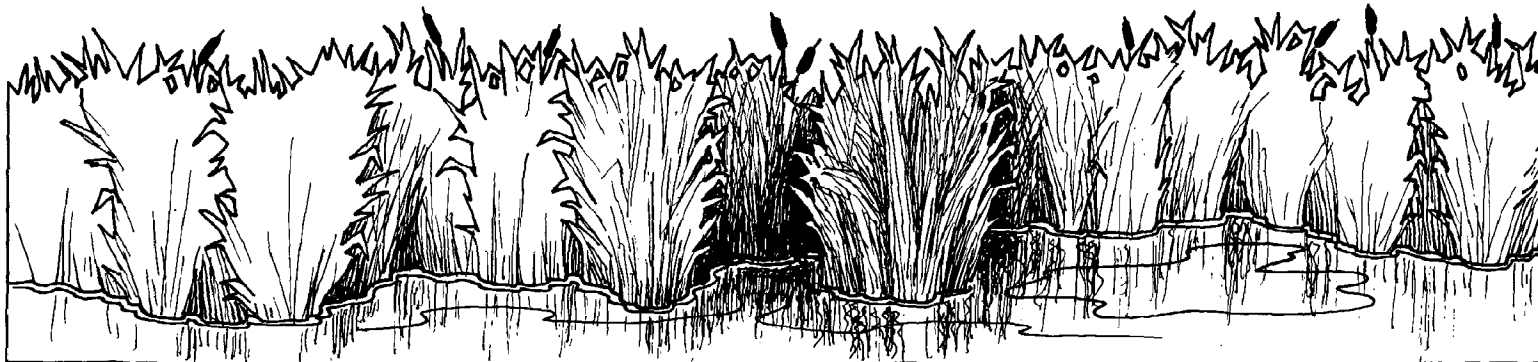
At a minimum, a wetlands' protection bill should define: wetlands, permitted or prohibited activities, exempted activities and methods of regulation or protection. Definition of a wetland should include, but not be limited to such conditions as water levels or general hydrology, soil conditions and vegetative characteristics. While U.S.D.I. Circular 39<sup>23</sup> definitions have classically been used to identify wetlands, it may prove more useful, both in identifying wetlands and in administering proposed regulations, if Wisconsin devised its own wetlands'

definition and classification system. Permitted activities should be those which will not significantly alter or harm the character or function of a given wetland. Prohibited activities include those which would alter or harm wetlands. Such activities may be reversible to some extent, but in general tend to be irreversible in nature. Exemptions are defined as those activities whose importance to the general public or the general good outweigh the values of wetlands in their normal state. In establishing exemptions, some flexibility is provided in application and administration of the bill.

#### Methods of Protection and Regulation<sup>24</sup>

Wetlands regulation or protection measures may take any of several forms, including permit systems, protective order systems and those which combine the two. A permit system puts a blanket order regulation on all wetlands defined or designated in the legislation. Both nonregulated uses and regulated uses requiring a permit are defined in the legislation. A protective order system designates or identifies specific wetlands which are to fall under regulation and in addition defines activities or uses to which these areas may or may not be put. For example, the Massachusetts' protective order system specifically identifies areas under protection and the uses in such areas which are prohibited.

Under either system, the state would establish minimum standards for wetland regulation or protection. Since each permit application would require individual appraisal employing established state standards, permit systems would likely be





administered at the local (county) level. On the other hand, protective order systems which single out various state wetlands for protection may be more suited to administration at the state level. In this way, counties which may contain large tracts of protected wetlands would not be overburdened with their administration.

As with almost any strategy, there are advantages and disadvantages associated with each system. Permit systems provide immediate and comprehensive protection to all wetlands as defined in the legislation. However, the permit process requires case by case evaluation. In addition, the general public may not be aware of the legislative regulations. On the other hand, protective order systems would allow protection to concentrate first on the most important wetlands; the owners would be notified of the action and the orders publically recorded. However, only the specified wetlands would be protected. To gain the benefits and reduce the detriments of each approach, the best form of wetlands' legislation may prove to be a combination of both systems.

#### **Basic Standards and Funding Needed**

Whatever form the wetland legislation ultimately takes, it should at a minimum provide regulations or standards which will

effectively protect and conserve wetlands and should reflect both public and private rights and interests in the land. Effective protection would require an inventory or mapping of Wisconsin's wetlands, an accurate system for recording changes in wetland status, size and type, and a system of policing to ensure that regulations are upheld.

The Wisconsin DNR estimated that the cost of wetland mapping alone should range from \$500,000 to \$1,000,000. When the costs of evaluating wetland quality and maintaining an up to date inventory of wetland status are included this figure increases to \$3.5 million.\* Put in perspective, this figure is less than one dollar per Wisconsin resident. No matter what the cost, passage of effective wetland regulatory and protective legislation requires a real compromise between various groups with vested interests in wetlands. More important, it requires greater public recognition and understanding of the value of undisturbed wetlands.

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\*Estimate is in 1976 dollars and is based on the New York wetlands inventory estimates provided by Dr. Ernest Hardy, Cornell University, Ithaca, N.Y. (personal communication).

## APPENDIX A

### Acquisition Programs

"By far the greatest recognition of wetlands has been at the public level both nationally and in Wisconsin and has largely been in connection with game and fish management."\*

State and federal acquisition programs have traditionally been geared toward protection of areas important to migratory waterfowl as well as toward protection of breeding grounds important for sport fish such as pike, muskie and walleye. By definition these areas include wetlands.

The Department of Natural Resources (DNR) has been active in wetland acquisition and restoration since 1930 when it began purchasing land on Horicon Marsh. To date, the DNR has acquired over 270,000 acres of wetlands, most of which is managed primarily for fish and game production. Wisconsin's publically owned wetlands total approximately 911,000 acres when wetlands in county and federal forests, the Necedah Refuge (Central Wisconsin Conservation Area) and the national wildlife refuges are added to those acquired by the DNR.\*

Various state and federal legislative acts, programs or public laws passed to provide funds for acquisition of public lands were outlined in *Wetland Use in Wisconsin: Historical Perspective and Present Picture*.\* These include the following legislation:

#### **Federal**

- Pittman-Robertson Act, 1937
- Dingell-Johnson Act, 1952
- Acquisition Act, 1958 (P.L. 85-585) (monies were first made available to Wisconsin under this act in 1974)

#### **Wisconsin**

- Voluntary Sportsmen's License Act, 1937 and,
- Outdoor Recreation Act Program (ORAP), 1961.

Wisconsin Statutes providing for privately run game and fur farms (29.574), licensed shooting preserves (29.573) and fish hatcheries (29.52) also afford some protection to wetlands. (See references 11 and 14 for more comprehensive outlines of Wisconsin Statutes aimed at protecting state wetlands and waters.)

Private organizations have also been active in wetland conservation and acquisition. Included among these are:

- the Citizens Natural Resources Association, promoting wetland conservation for Wildlife Inc.; and,
- the Wisconsin Chapter of the Nature Conservancy.\*

Where regulation or legislation have failed to conserve wetlands, acquisition has often proved the last resort. Today approximately 1.6 million acres of Wisconsin wetlands remain in private ownership. While the state and federal governments may have plans for acquisition of some of these wetlands, funding for public acquisition and maintenance of all Wisconsin's wetlands is out of the question. The majority of these wetlands will therefore remain in private ownership. For these lands some compromise between private interest and public good must be established.

## APPENDIX B

### Current Drainage Laws and Policies

Drainage Laws have existed since territorial days. Initially, these laws stressed drainage and organization of drainage districts. Many such laws have since been repealed or modified.<sup>4</sup>

#### Wisconsin Drainage Laws and Policies

Current rules regulating drainage and drainage districts in Wisconsin are contained in Chapter 88 of the Wisconsin Statutes. This chapter outlines:

- establishment of drainage districts,
- special procedures in cases affecting navigable waters,
- procedures for hearings on the organization of drainage districts,
- regulations for construction, maintenance and improvement of drains,
- regulations for enlargement, consolidation, division and dissolution of drainage districts.

#### Federal Drainage Laws and Policies

In the 1940's, the federal government established the Agricultural Stabilization and Conservation Service (ASCS) to provide for cost sharing to both individual and group drainage projects. Responsibility for providing technical assistance to ASCS funded projects was assigned to the Soil Conservation Service (SCS) in 1952. Both ASCS and SCS policies have been modified and changed over the years. Current policies are outlined briefly below.

#### Funding for Cost Sharing

Cost sharing for drainage was dropped from the national program in 1971 with the provision that counties could elect to continue cost sharing for drainage in 1971, 1972 and 1973 if it was in their 1970 program. The option was not available in 1974 and 1975 but was reinstituted in 1976.

#### ASCS General Policy<sup>1</sup>

The ASCS has a general policy against drainage which will bring new land into agricultural production. Such projects are not eligible for cost sharing. A special provision excepts low income farmers allowing them to receive federal cost sharing to bring new land into production. In all other cases, cost sharing for drainage may be provided on "farmland used during at least two of the last five years to produce cultivated crops or crops normally seeded for hay or pasture in the area." Cost sharing policies apply *only* to types 1 and 2 wetlands; types 3 through 5 are not eligible.\* Maximum cost sharing is not to exceed 50 percent of the cost and in general is limited to 30 percent.

#### SCS Policy

The SCS has technical responsibility for establishing drainage systems which qualify for federal cost sharing under ASCS programs. In accord with ASCS policy, the SCS will not provide technical or financial assistance for any drainage or alteration of wetland types 3 through 20. It is also a stated policy of the SCS to "assist in restoring damaged wetlands that are not irrevocably committed to other use",<sup>2</sup> and to encourage wetland preservation programs and establishment of wetland habitat where possible.

The federal laws, policies and regulations described in this section apply *only* where landowners request assistance in drainage enterprises. They do not prohibit individual landowners from converting *any* land into arable land. They simply make such programs ineligible for technical or financial assistance.<sup>3</sup>

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\* The 1962 Reuss Amendment to the Federal Agricultural Appropriations Act prohibits the government from subsidizing any drainage on wetlands classed as types 3, 4 and 5. Wetland types are based on the USDI Circular 39 definition.<sup>32</sup>

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